

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
BEFORE THE RHODE ISLAND STATE LABOR RELATIONS BOARD

IN THE MATTER OF

STATE OF RHODE ISLAND,
DEPARTMENT OF CORRECTIONS

-AND-

RI COUNCIL 94, AFSCME, AFL-CIO
(EE 3260)

CASE NO: EE-3260

and EE-3620

Unit Clarification: Assistant Administrator
Financial Management

-AND-

RHODE ISLAND BROTHERHOOD OF
CORRECTIONAL OFFICERS (EE-3620)

DECISION AND ORDER

TRAVEL OF CASE

The above matter came on to be heard on a Request for Unit Clarification (hereinafter Petition) for the positions of "Chief of Administrative Services" held by P. Medeiros and the "Assistant Administrator Financial Management" held by M. Tucci. The petition was filed with the Rhode Island State Labor Relations Board (hereinafter "Board") on September 18, 1998 by the Rhode Island Brotherhood of Correctional Officers (hereinafter "RIBCO").

Pursuant to R.I.G.L. 28-7-9 (b) (5), an informal hearing was held on October 5, 1998. Representatives of the Union and the Employer were in attendance and provided information to the Board's Investigative Agent. The Board's Agent also provided the parties with information from the Board's files concerning the title of Chief of Administrative Services.¹ On November 16, 1998, the Board's Agent² interviewed Mr. Peter Medeiros the Chief of Administrative Services and on November 18, 1998, Ms. Mary Ann Tucci, the Assistant Administrator, Financial Management. Upon conclusion of the investigation, the Board's Agent forwarded a copy of her eight (8) page written report to both the Union and the Employer. On December 23, 1998, the Employer submitted a written response to the Agent's report.

¹ (1) Letter dated June 10, 1991, indicating that the Chief of Administrative Services-Management Services would be included in Case No. EE-1788 (former professional unit represented by Council 94).

(2) Certification for Case No. EE-1788 which is the unit that included the Chief of Administrative Services in 1991.

(3) Certification for Case No. EE-3506 which is the certification that replaced EE-1788.

² Acting Administrator, Joan N. Brousseau

On June 23, 1999, a second union, Council 94 also submitted a request for unit clarification, seeking to accrete the position of Assistant Administrator of Financial Management into the bargaining unit defined in Case No. EE-3260. Thereafter, in accordance with R.I.G.L. 28-7-9 (b) (5), another informal hearing was held on July 20, 1999. Representatives of both Council 94 and the Employer were in attendance.³ Since an investigation had already taken place on the requested position, the Board's Agent provided Council 94 with a copy of the written report and gave Council 94 thirty (30) days to respond in writing to the report.⁴

On February 24, 2000, the Board reviewed the Agent's report and the Employer's response and determined that the matter should proceed to formal hearing, without any preliminary determination. The formal hearing was held on May 9, 2000 and representatives of Council 94, RIBCO and the Employer were all in attendance and were provided with full and ample opportunity to present evidence and to examine and cross examine witnesses.⁵ Upon conclusion of the formal hearing, the parties requested the opportunity to file briefs, a request which was granted by the Board. Briefs were due thirty (30) days after their receipt of the transcript. The Employer filed its brief on July 7, 2000. RIBCO filed its brief on July 12, 2000. After requesting a one week extension, Council 94 filed its brief on July 28, 2000. In arriving at its Decision and Order herein, the Board has reviewed and weighed the exhibits, witness testimony, the Agent's report and the written briefs of all parties.

FACTUAL BACKGROUND

On March 6, 1980, in Case No. EE-3260, Rhode Island Council 94, AFSCME, AFL-CIO was certified by the Board to represent: "All clerical and maintenance employees, excluding the Coordinator of Maintenance" in the Division of Maintenance Services, Maintenance Unit.

On February 16, 1998, in Case No. EE-3608, RIBCO was certified to represent "all supervisory employees employed by the Department of Corrections, excluding supervisors employed in Probation and Parole".

³ Although the Rhode Island Brotherhood of Correctional Officers had been notified of the informal hearing, no representative attended.

⁴ All parties accepted the report as being essentially accurate factually; the parties disagreed with the legal conclusions to be made from the report. Therefore, the Board has referred to the report and considered it part of the record for review in this case.

⁵ At the commencement of the hearing, RIBCO announced that the parties were attempting to work out the issue of the position of Chief Administrative Services and that the hearing would not be proceeding on that particular position.

On October 6, 1999, in Case No. EE-3620, RIBCO was again certified to represent “all supervisory employees employed by the Department of Corrections, excluding supervisors employed in Probation and Parole”.⁶

POSITIONS OF THE PARTIES

The Employer states that the position of Assistant Administrator for Financial Management is one that is vital to management in terms of handling confidential data and review of developmental policies. (See Employer’s brief, p. 1) Therefore, the Employer argues that the position is confidential under the “labor nexus” test as set forth in Barrington School Committee v RI State Labor Relations Board, 608, A.2d 1126 (R.I. 1992) (hereinafter “Barrington”). Further, the Employer argues that even if this Board were to determine that the narrow “labor-nexus” test does not apply, then this is a case where the Board should expand the “labor-nexus” test to include a broader formulation of confidentiality. The Employer argues that the Court, in its Barrington decision, specifically declined to embrace the “labor-nexus” test as all encompassing or as “necessarily controlling in all future instances” and indicated that “a broader definition” of those employees considered to be “confidential” would be desirable in other circumstances. (See Employer’s Brief p. 8, citing the Barrington decision, footnote 8, which cites N.L.R.B. v Hendricks County Rural Electric Membership Corp., 454 U.S. 170 (1981)).

RIBCO argues that the evidenced adduced at the formal hearing does not support a finding that the position of Assistant Administrator, Financial Management is either “managerial” or “confidential” as those terms are defined by current labor law. Furthermore, RIBCO argues that this position shares a “community of interest” with RIBCO, under the test set forth in RI Public Telecommunications Authority vs Rhode Island State Labor Relations Board, 650 A.2d 479 (R.I. 1994).

Council 94 argues that Ms. Tucci is neither a supervisor, nor a confidential employee. Further, she shares a community of interest with other classifications set forth in Council 94’s certification in case No. EE-3260.

SUMMARY OF TESTIMONY

Council 94 presented the testimony of Ms. Mary Ann Tucci, the Assistant Administrator for Financial Management. Her primary duties, which take up the bulk of her time, consist of processing receipts for good and services, purchasing, collecting monies from various agencies

⁶ This second certification came about after the National Association of Government Employees attempted to

(such as Immigration and Naturalization and the Federal Marshals) and collecting commissions from vending machines located on the grounds at the Department of Corrections. (TR. p. 6.; Agent's report, p. 6) The Department of Corrections is one of the pilot agencies in a new program for the state called FMIS-Financial Management Information System, and Ms. Tucci is involved with that program. (TR. p. 6) Ms. Tucci supervises seven people in nine positions.⁸ (TR. p. 5) All but two of these subordinate employees are members of RIBCO; the remaining two are members of Council 94. (TR. p. 5,11) On occasion, Ms. Tucci has had to speak to employees about certain matters such as flex time, although she is not sure that the same constitutes discipline. She has never put anything in writing into personnel files. (TR. p. 14,16)

Tucci's immediate supervisor is Ms. Joanne Hill. Ms. Hill's supervisor is Mr. Richard Frechette, although Mr. Frechette does have frequent direct contact with Ms. Tucci. (TR. p. 13) On occasion, both Ms. Hill and Mr. Frechette ask Ms. Tucci for statistical information and information concerning expenditure patterns. (TR. p. 8, 4) However, the bulk of the information they seek has to do with the status of a particular purchase order and where it is "in the pipeline". (TR. p. 7) Ms. Tucci attends Division of Administration staff meetings every other week, although the meetings are held on a weekly basis. (TR. p. 8) On occasion, labor relations issues are reported at those meetings, but there is no discussion as to strategy or negotiations. (TR. p. 9) Ms. Tucci also attends Financial Resources staff meetings every other week. (TR. p. 9)⁹ Ms. Tucci rebutted the statement attributed to Mr. Frechette as set forth in the Agent's report, regarding her participation on the "Labor Management Committee" and uniforms. She stated that she has never sat on that Committee or done anything in connection with that Committee. Her only involvement with uniforms has been processing the orders for uniforms and making sure it gets "through the system". (TR. p. 9) She has never participated in or sat in on any labor negotiations or meetings of management to prepare for labor negotiations. (TR. p. 10) Neither Ms. Hill nor Mr. Frechette has ever indicated to her that information they request will be used for labor negotiation purposes. (TR. p. 10) In her opinion, all the information generated by her office is public record and is available to unions, upon request. (TR. p. 10)

become the certified bargaining Agent for the unit and lost in an election.

⁷ This program was described by Mr. Richard Frechette as a multiple year process of 5-7 years which will represent major changes in the way the state does business and will have major implications with respect to the use of labor in the Department of Corrections and other State Departments.

⁸ One position is vacant and one person has been out of work for some time.

⁹ Other Council 94 members also attend this meeting.

All the employees in Ms. Tucci's office have access to the same information that she has. (TR. p. 1) When she needs certain information for her supervisors, she obtains the same from her subordinates. (TR. p. 11) Ms. Tucci has frequent contact with other members of RIBCO. (TR. p. 11) She is subject to the Department of Correction's Code of Conduct and Code of Ethics. (TR. p. 11) Ms. Tucci does not have any advance knowledge of the Department's labor relations policies, nor does she participate in the formulation of these policies. (TR. p. 12)

During her workday, Ms. Tucci interacts with Mr. Bob Farris, a Business Management Officer in Council 94, who works in the same building on a daily basis. (TR. p. 15, 17) Ms. Tucci works the same schedule as Mr. Farris. (TR. p. 17)

The Employer presented the testimony of Mr. Richard Frechette, the Associate Director for Financial Resources or Chief Financial Officer, since 1989. (TR. p. 19) Mr. Frechette is responsible for all the financial activities of the Department, and is the chief financial advisor to the Director of the Department, as it relates to management of budgets, the financial implications of various policies, operating and capital budgets, and the overall responsibility for the day-to-day operations of any of the financial activities in the Department. (TR. p. 20) He also has a major role in reviewing policy at the Department. (TR. p. 20) He testified that he relies regularly on four people; the Administrator of Financial Management, two Assistant Administrators of Financial Management and a Fiscal Resources Administrator. (TR. p. 20-21) He stated that Ms. Tucci reports directly to him for day-to-day operations of business management and that she reports to Ms. Hill for budgetary items. (TR. p. 21) He testified that Ms. Hill is involved with labor relations matters. (TR. p. 21) Mr. Frechette testified that he has not asked Ms. Tucci to assist him in matters regarding policy or other management issues for two reasons: (1) He relies more heavily on a day-to-day basis on his other Assistant Administrator who primarily functions on budgetary issues and implementing policy, and (2) Soon after Ms. Tucci took the position, the petition to accrete her position was filed. (TR. p. 22) During recent interest arbitration between the Department and RIBCO, Mr. Frechette's office was asked to gather information from various sources or personnel within the Department, particularly on the issue of privatization. (TR. p. 23-24) Ms. Tucci was not involved in this process because Mr. Frechette relies upon the other Assistant Administrator and because of the petition to accrete. (TR. p. 24) Mr. Frechette believes that Ms. Tucci will have a future role in chairing a hiring committee and report recommendations to the Director. (TR. p. 27)

DISCUSSION

There are two issues to be decided by the Board in this case. First, whether Ms. Tucci's position is either managerial or confidential, and thereby excluded from collective bargaining. In the event that the Board finds that the position is eligible for union membership, the next inquiry is whether she share a community of interest with either of the petitioning unions, and to which one the position should be accreted.

"Managerial" employees are employees who "formulate and effectuate management policies by expressing and making operative the decisions of their employers." Fraternal Order of Police, Westerly Lodge 10 v. Town of Westerly, 659 A.2d 1104,1107 (1995); State v. Local 2883 AFSCME, 463 A.2d 186, 190 (1983) citing and quoting in part NLRB v. Bell Aerospace Co., 416 U.S. 267, 278 (1974). Managerial employees must exercise discretion within or even independently of established employer policy and must be aligned with management. N.L.R.B. v Yeshiva University, 444 U.S. 672 (1980). An employee may be excluded as managerial only if he represents management interests by taking or recommending discretionary actions that control or implement employer policy. Id. "Employees whose decision-making is limited to the routine discharge of professional duties in projects to which they have been assigned cannot be excluded from coverage even if union membership arguably may involve some divided loyalty. Only if an employee's activities fall outside the scope of the duties routinely performed by similarly situated professionals will he be found aligned with management." Id at 690.

In this case, Ms. Tucci's un rebutted testimony established that she has nothing to do with establishing or implementing policy. In fact, the Employer's own witness, Mr. Frechette, freely acknowledged that he uses the other Assistant Administrator for implementing policy. Therefore, the position of Assistant Administrator for Financial Management, as held by Ms. Tucci, will not be excluded from collective bargaining as a "managerial" employee.

In Barrington School Committee v. Rhode Island State Labor Relations Board, 694 A.2d 1185 (R.I. 1992) the Rhode Island Supreme Court considered the question of what employees qualify as "confidential" and held:

"Two categories of employees are recognized as confidential under the test and are therefore excluded from collective bargaining. The first category comprises those confidential employees who assist and act in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. ... The second category consists of employees who, in the course of their duties, regularly have access to confidential information concerning anticipated changes which may result from collective bargaining

negotiations. (Barrington at p. 1136, quoting NLRB v. Hendricks County Rural Electric Membership Corp, 454 U.S. 170 at 189)

This two prong test of confidentiality is commonly referred to as the “labor-nexus” test. In this case, there was absolutely no testimony that Ms. Tucci works in a confidential capacity to persons who formulate, determine, and effectuate management policies in the field of labor relations. While Mr. Frechette *may* have a role in formulating, determining and effectuating management policies, in the field of labor relations¹⁰, no evidence was submitted or testimony was elicited to establish that Ms. Tucci acts in a “confidential” capacity to Mr. Frechette. In fact, the testimony established that the information she provides to Mr. Frechette comes from her unionized subordinate employees who clearly do not act in a confidential capacity to Mr. Frechette.

As for Ms. Hill, Ms. Tucci’s immediate supervisor, the only evidence in the record regarding Ms. Hill’s role with labor relations is a statement made by Mr. Frechette that Ms. Hill “is involved in labor relations”. Such a statement is hardly illuminating as to what exactly it is that Ms. Hill does in regards to “labor relations”. She could be the person to whom all grievances are brought at the first level. She could be someone who has authority to issue written reprimands. She could be someone who is well versed in labor issues. She could be involved with formulating, determining or effectuating management policies in the field of labor relations. This Board has no way of knowing what being “involved in labor relations” means for Ms. Hill because no evidence or testimony was submitted. The Board will not speculate as to what Ms. Hill’s role is. The Board does find that the Employer has not met its burden to exclude Ms. Tucci on the basis that she acts in a confidential capacity to Ms. Hill, who in turn has authority to formulate, determine, and effectuate management policies in the field of labor relations.

¹⁰ This issue was not directly addressed, so the Board is making an assumption that Mr. Frechette does have a role in formulating, determining and effectuating management policies, in the field of labor relations. Mr. Frechette only testified that he deals with the “ financial implications of various policies”.

In addition, there was no evidence to support an inference or finding that Ms. Tucci, in the course of her duties, regularly has access to confidential information concerning anticipated changes which may result from collective bargaining negotiations. In fact, the record is quite clear that Ms. Tucci's primary role is to process paperwork concerning purchase orders and to supervise her subordinate employees. On an occasional basis, she provides information to Mr. Frechette. She is not told the reason for Mr. Frechette's request, nor does the record establish that any information she provides is used for anticipated changes to collective bargaining or that she has access to how the information is assimilated or used by Mr. Frechette. The record is simply devoid of any evidence that Ms. Tucci has access to any confidential portions of the Department's information. Nor does the record support even an inference that she may obtain advance information of the Department's position with regard to contract negotiations, the disposition of grievances or other labor relations matters. Therefore, the Employer has not established that the position of Assistant Administrator for Financial Management held by Ms. Tucci is a confidential position excludable from collective bargaining.

The Employer argues that this is also a case where the Board should consider an expansion of the labor-nexus test, as set forth by the Mr. Justice Powell's dissent in N.L.R.B. v Hendricks County Rural Electric Membership Corp. 454 U.S. 170 (1981) (as cited by the Barrington Court). Mr. Justice Powell asserted that in order to maintain the proper division between labor and management, employees who by their duties, knowledge, or sympathy are aligned with management and should not be treated as members of labor. (See Employer's brief p. 7)

The Board has considered this argument, but is satisfied that the nature of this position does not warrant an expansion of the "labor-nexus" test, primarily because all of the information generated by Ms. Tucci's position, comes from information derived from unionized employees. While Ms. Tucci attends Division of Administration staff meetings every other week, and Financial Resources meetings every other week, there was no evidence in the record that the issues discussed at these staff meetings are confidential or sensitive or are called for 'management ' reasons. These meetings could be merely status updates regarding various projects and programs; however, again the Board will not speculate on a silent record. Furthermore, there was no evidence to suggest that the employees attending these meetings are "aligned with management". In fact, there is at least one other Unionized employee in attendance

at the Financial Resources meeting. Finally, there is no evidence to suggest that Ms. Tucci is “sympathetic to management”; in fact, upon direct examination, she expressed an interest in becoming a member of RIBCO. Therefore, for all of the foregoing reasons, the Board is not persuaded to expand the narrow “labor nexus” test set forth in Barrington

The final issue for disposition is whether the position of Assistant Administrator for Financial Management has a “community of interest” with either or both of the petitioning unions. First, in the case of Council 94, its certification is for clerical and maintenance employees in the Division of Maintenance/Maintenance Unit. The position at issue is located within the Financial Management branch of the Department of Corrections, not Maintenance. Therefore, this position does not meet the criteria of the certification in Case No. EE-3260, and the petition of Council 94 is hereby dismissed.

As for RIBCO, the question is whether there is a sufficient community of interest to accrete this position, utilizing the factors cited in Rhode Island Public Telecommunications Authority vs Rhode Island State Labor Relations Board, 650, A.2d 479 (R.I. 1994). In this case, the position of Assistant Administrator and the employees in the petitioning union all work for the same State Department, are located at the same complex of buildings, and frequently interact. All employees are subject to the same Code of Ethics and Code of Conduct. Five of the seven employees in Ms. Tucci’s office belong to the petitioning union. Finally, this position, in its previous form, held by Mr. Dixon, was once in this bargaining unit. (TR. p. 31) Therefore, for all of the foregoing reasons, the Board finds that there exists a sufficient community of interest between the Assistant Administrator for Financial Management and RIBCO’s supervisory unit as defined in Case No. EE-3620, and that the position shall be and is hereby accreted to the bargaining unit defined by Case No. EE-3620.

FINDINGS OF FACT

- 1) The Respondent , State of Rhode Island, Department of Corrections is an “Employer” within the meaning of the Rhode Island State Labor Relations Act.
- 2) Council 94 and RIBCO are both labor organizations, which exist and are constituted for the purpose, in whole or in part, of collective bargaining relative to wages, rates of pay, hours, working conditions and all other terms and conditions of employment and of dealing with employers concerning grievances or other mutual aid and protection.

- 3) On March 6, 1980, in Case No. EE-3260, Council 94, AFSCME, AFL-CIO was certified by the Board to represent: "All clerical and maintenance employees, excluding the Coordinator of Maintenance" in the Division of Maintenance Services, Maintenance Unit.
- 4) On February 16, 1998, in Case No. EE-3608, RIBCO was certified to represent "all supervisory employees employed by the Department of Corrections, excluding supervisors employed in Probation and Parole".
- 5) On October 6, 1999, in Case No. EE-3620, RIBCO was again certified to represent "all supervisory employees employed by the Department of Corrections, excluding supervisors employed in Probation and Parole".
- 6) The position of Assistant Administrator for Financial Management is held by Ms. Mary Ann Tucci whose primary duties consist of processing receipt for good and services, purchasing, collecting monies form various agencies (such as Immigration and Naturalization and the Federal Marshals) and collecting commissions from vending machines located on the grounds at the Department of Corrections. This position also has some responsibility in a pilot program for a statewide Financial Management Information System. Ms. Tucci supervises seven unionized employees and has occasionally had to speak to employees about certain matters such as flex time. She has never put anything in writing into personnel files.
- 7) Ms. Tucci's immediate supervisor is Ms. Joanne Hill. Ms. Hill's supervisor is Mr. Richard Frechette, although Mr. Frechette does have frequent direct contact with Ms. Tucci. On occasion, both Ms. Hill and Mr. Frechette ask Ms. Tucci for statistical information and information concerning expenditure patterns. However, the bulk of the information they seek has to do with the status of a particular purchase order and where it is "in the pipeline".
- 8) Ms. Tucci attends Division of Administration staff meetings every other week, although the meetings are held on a weekly basis. On occasion, labor relations issues are reported at those meetings, but there is no discussion as to strategy or negotiations. Ms. Tucci also attends Financial Resources staff meetings every other week. She has never participated in or sat on the "Labor Management Committee".
- 9) Ms. Tucci has never participated in or sat in on any labor negotiations or meetings of management to prepare for labor negotiations. Ms. Tucci does not have any advance knowledge of the Department's labor relations policies, not does she participate in the formulation of these policies.

- 10) Ms. Tucci is subject to the Department of Correction's Code of Conduct and Code of Ethics.
- 11) Mr. Frechette believes that Ms. Tucci will have a future role in chairing a hiring committee and report recommendations to the Director.

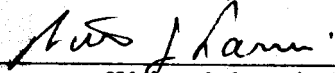
CONCLUSIONS OF LAW

- 1) The position of Assistant Administrator for Financial Management held by Mary Ann Tucci is neither managerial nor confidential, and is eligible for collective bargaining.
- 2) The position of Assistant Administrator for Financial Management shares a community of interest with RIBCO.
- 3) Council 94's certification in Case No. EE-3260 covers only clerical and maintenance employees in the Division of Maintenance and does not include employees in the Department of Corrections' Division of Financial Management.

ORDER

- 1) The position of Assistant Administrator for Financial Management held by Mary Ann Tucci shall be and is hereby accreted to the certification in Case No. EE-3620.

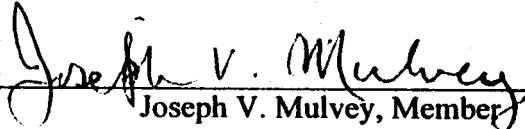
RHODE ISLAND STATE LABOR RELATIONS BOARD



Walter J. Lanni, Chairman



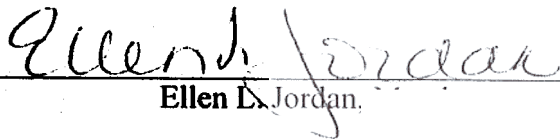
Frank J. Montanaro, Member



Joseph V. Mulvey, Member



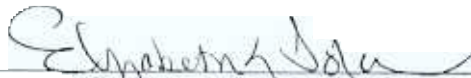
Gerald S. Goldstein, Member



Ellen L. Jordan, Member




John R. Capobianco, Member



Elizabeth S. Dolan, Member

Entered as an Order of the
Rhode Island State Labor Relations Board

Dated: February 7, 2001

By: 
Joan N. Brousseau, Administrator

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